

UNITED STATES OF AMERICA, )  
 )  
v. ) Criminal No. 97-86-B )  
 )  
ALEX HOOD, JR., )  
 )  
 )  
Defendant )

On December 17, 1997, a three-count indictment was returned against Alex Hood, alleging in Count I, possession of a firearm in violation of 18 U.S.C. § 922(g)(1), Count II, possession with the intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), and Count III, forfeiture of \$4,895 pursuant to 21 U.S.C. §§ 841(a)(1) and 853. Hood was not apprehended on the warrant issued as a result of indictment until August 22, 1998. On October 28, 1998, he pled guilty to the indictment before the Honorable Morton A. Brody. A revised presentence investigation report (PIR) issued on January 14, 1999. Sentencing took place February 4, 1999.

Pursuant to the United States Sentencing Commission Guidelines, the Court made guideline computations. The Court determined that the total offense level was 19 and the criminal history category was IV, resulting in a guideline range for imprisonment of 46 to 57 months (Tr. p. 3). Within the Guideline range the Court sentenced Hood on Counts I and II of the indictment to concurrent terms of 46 months in prison. The Court imposed no fine, finding that the defendant was unable to pay any fine and was not likely to become able to pay any

additional fines required by the guidelines and no alternative sanction was available or appropriate (Tr. p. 4). However, the Court did impose a special assessment of \$100.00 on two of the three counts. Concurrent terms of three years of supervised release were ordered to follow the period of incarceration. On Count III Hood was ordered to forfeit the \$4,895 seized during the search of his home. No notice of appeal was filed. On January 3, 2000, Hood filed the instant motion under 28 U.S.C. § 2255.

### **Discussion**

Petitioner alleges three separate grounds in his motion. He argues first that the District Court lacked jurisdiction to enhance his sentence on the firearms charge by virtue of his prior drug conviction because the Government failed to file an information alleging the prior conviction pursuant to 21 U.S.C. § 851. Second, Hood argues that the sentencing court lacked jurisdiction to award three criminal history points for one of his convictions because the Government failed to file a § 851 informational notice. Finally, citing *Strickland v. Washington*, 466 U.S. 668 (1984), Hood argues that his attorney's failure to raise the objections regarding noncompliance with § 851 at the time of the sentencing and his failure to take an appeal following sentencing amounted to ineffective assistance of counsel. Hood claims that he was prejudiced by counsel's deficient performance by "being erroneously sentenced to a significantly longer sentence than the law allows." (Petitioner's Motion at p. 8).

Petitioner's motion brought pursuant to § 2255 is "not a surrogate for a direct appeal." *David v. United States*, 134 F.3d 470, 474 (1<sup>st</sup> Cir. 1998). The statute provides for post-conviction relief in four instances, "namely, if the petitioner's sentence (1) was imposed in violation of the Constitution, or (2) was imposed by a court that lacked jurisdiction, or (3)

exceeded the statutory maximum, or (4) was otherwise subject to collateral attack.” *See Hill v. United States*, 368 U.S. 424, 426-27 (1962) (construing statute). The fourth category includes only assignments of error that reveal "fundamental defect[s]" which, if uncorrected, will "result[ ] in a complete miscarriage of justice," or irregularities that are "inconsistent with the rudimentary demands of fair procedure." *Id.* at 428. As Petitioner has failed to demonstrate that he is entitled to relief under any of the four instances cited above, I recommend that the motion be denied.

**A. Lack of Jurisdiction to Enhance Sentence Because of Failure to File an Information Pursuant to 21 U.S.C. § 851, Alleging Prior Convictions**

In Count I of the indictment Hood was charged with violating 18 U.S.C. § 922(g)(1), Possession of a Firearm by a Felon, an offense carrying a potential penalty of not more than ten years imprisonment and not more than a \$250,000 fine or both pursuant to 18 U.S.C. § 924(a)(2). In Count II he was charged with violating 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute Marijuana, an offense carrying a potential penalty of not more than five years imprisonment and not more than a \$250,000 fine or both pursuant to 21 U.S.C. § 841(b)(1)(D). As to both Counts the concurrent 46 month sentence Petitioner received was less than the statutory maximum. As all fines were waived, the maximums pertaining to fines were not implicated. There is no statutorily mandated minimum fine or period of imprisonment under either § 924(a)(2) or § 841(b)(1). Thus the sentence imposed on each count was well within the statutory minimum/maximum term.

Petitioner’s claim that the District Court lacked jurisdiction to impose this sentence has no merit. His contention appears to be based upon the notion that his sentence was enhanced because the “minimum” sentence under § 924(a)(2) is a fine and the Court imposed a period of

incarceration. He simply misreads the statute. There is no “minimum” term under either 18 U.S.C. § 924(a)(2) or 21 U.S.C. § 841(b)(1)(D), as each of these provisions contains a sentencing range. Petitioner’s sentence was within that range. His prior convictions played no role in causing that *statutory* range to exceed the maximum potential penalty nor did they serve to increase any minimum penalty, as that term is commonly understood.

Petitioner relies upon *Suveges v. United States*, 7 F.3d 6 (1<sup>st</sup> Cir. 1993) in support of his argument that the Court enhanced his sentence as a result of a prior conviction without the benefit of the required informational notice under 21 U.S.C. § 851. It is true that in *Suveges* the First Circuit stated that “[f]iling of informational notice concerning increased punishment for career offenders was jurisdictional and court would lack authority to enhance supervised release term absent filing of notice.” Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(C), 411, 411(a)(1), 21 U.S.C.A. §§ 841(b)(1)(C), 851, 851(a)(1); 18 U.S.C.A. §§ 3559(a)(1, 3), 3583, 3583(b)(2). Relying upon that language, Petitioner asserts that the District Court lacked jurisdiction to “enhance” his sentence. He therefore argues that since his complaint goes to jurisdictional matters, his failure to raise any prior objection should not act as a procedural bar to this motion. This reliance is misplaced in light of *Prou v. United States*, 199 F.3d 37 (1<sup>st</sup> Cir. 1999). In *Prou* the First Circuit clarified that its “jurisdictional” language in *Suveges* was not intended to suggest that the District Court lacked subject matter jurisdiction to sentence an offender in the absence of an informational notice under § 851. The Court explained that a defendant's failure to object at sentencing and/or on direct appeal to the untimeliness of the government's section 851(a)(1) information constitutes a procedural default,

leaving the issue open to collateral attack only if the defendant can show cause and prejudice. *Id.* at 47, (citing *Suveges*, 7 F.3d at 10). This record reveals neither cause nor prejudice.

Furthermore, if one were to reach the merits of Petitioner's argument, the First Circuit stated in *United States v. Sanchez*, 917 F.2d 607 (1<sup>st</sup> Cir. 1990), that there is no requirement of an informational notice under § 851 when the enhancement is the result of a Sentencing Guideline, rather than the product of a statutory provision. *Sanchez* also makes it clear that the informational notice only pertains to a person who has been convicted under the provisions of 21 U.S.C. § 841 *et seq.* In the present case Petitioner complains about an enhancement which arose solely due to the application of U.S.S.G. § 2K2.1(a)(4)(A) to the charge of possession of a firearm by a felon.

In summary, Petitioner's sentence was the result of a Guideline computation which was well within the parameters of the statutory range for each count. The Court relied upon the conviction identified in ¶ 40 of the PIR, a federal conviction for Conspiracy to Possess Cocaine which arose from an arrest on September 1, 1986, in determining the base level of 20 on Count I of the indictment. The sentence in Count II likewise arose from a straightforward application of the Sentencing Guidelines, without regard for statutory enhancement due to prior convictions. (PIR ¶ 65). There was nothing in either calculation which possibly triggered the requirements of 21 U.S.C. § 851(a)(1) and therefore Petitioner's motion as stated in ground one has no basis.

**B. Imposition of Criminal History Category IV pursuant to U.S.S.G. § 4A1.1(a)**

In order to arrive at the ultimate sentence in this case, the Court established that the defendant had a criminal history category of IV. Petitioner takes issue with a three point enhancement he received for one prior sentence of imprisonment exceeding one year and one

month, apparently believing that his criminal history category should be III. He does not specify in his argument which of his prior convictions impermissibly resulted in the three additional criminal history points. He had both a prior counterfeiting conviction and a 1990 federal drug conviction, and apparently there was some confusion in the record about whether the counterfeiting conviction had been vacated. However, ultimately the Court did add the three point enhancement for that conviction.<sup>1</sup> Hood's failure to specify which conviction resulted in the allegedly improper three point enhancement is reason enough to reject this claim. *See United States v. Zannino*, 895 F.2d 1, 17 (1<sup>st</sup> Cir. 1990). ("It is not enough merely to mention a possible argument in the most skeletal way.")

Since Hood never challenged either of the two prior convictions which cumulatively resulted in his Category IV criminal history, and indeed does not affirmatively challenge them even now, there is a significant procedural bar to considering this issue for purposes of § 2255 relief. In the absence of exceptional circumstances challenges to the straightforward application of the Sentencing Guidelines to the facts of a given case ordinarily must be raised on direct appeal. A motion filed pursuant to § 2255 does not serve as a substitute for direct appeal. *Knight v. United States*, 37 F.3d 769, 772-774 (1<sup>st</sup> Cir. 1990). Although Petitioner attempts to frame this challenge to his criminal history category as a jurisdictional challenge, it simply is not and it must fail.

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<sup>1</sup>Government Exhibit #1, which is attached to the Government's Opposition to Motion, explains the factual background surrounding the allegedly vacated prior conviction. The Revised Presentence Investigation Report did not count that conviction and treated Defendant as having a Category III Criminal History. The Court ultimately did not adopt the report's analysis, and the conviction in ¶ 39 (the counterfeiting conviction) was considered. Petitioner has never objected to the historical accuracy of the facts as recited in Government Exhibit #1 and he does not even now raise any such objection.

### C. Ineffective Assistance of Counsel

When pressing a claim for ineffective assistance of counsel Hood must meet the familiar two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Hood has presented nothing to suggest that his counsel failed to perform competently nor is there any suggestion in the record that Hood was impermissibly prejudiced in any way by anything that counsel did. Counsel's allegedly defective performance was his failure to object to the lack of the § 851 informational notice and the failure to take a direct appeal on that issue. The Court should summarily reject Hood's Sixth Amendment claim.

### Conclusion

Based upon the foregoing, I recommend that the Court DENY Petitioner's Motion to Vacate, Set Aside or Correct Sentence without an evidentiary hearing.

### Notice

A party may file objections to those specified portions of this report or proposed findings or recommended decision for which de novo review by the district court is sought, together with a supporting memorandum, within ten days after being served with a copy hereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated this 11<sup>th</sup> day of April, 2000.

U.S. District Court  
District of Maine (Bangor)

CJACNS CLOSED

CRIMINAL DOCKET FOR CASE #: 97-CR-86-ALL

USA v. HOOD

Filed: 12/17/97

Dkt# in other court: None

Case Assigned to: JUDGE GENE CARTER

ALEX HOOD, JR (1)

defendant

[term 02/04/99]

GREGG D. BERNSTEIN, ESQ.

[term 02/04/99]

[COR LD NTC cja]

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